NO. 15092

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARYL CHESSMAN,

Petitioner and Appellant,

vs.

HARLEY O. TEETS, Warden, California State Prison, San Quentin, California,

Respondent and Appellee.

APPELLANT'S OPENING BRIEF

Appeal from an Order of the United States District Court, Northern District of California, Southern Division, by the Hon. Louis E. Goodman, District Judge, Discharging a Writ of Habeas Corpus and Remanding Petitioner to the Custody of Respondent.

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MISCELLANEOUS

NOTE

In this brief:

The Transcript of Record from the District Court will be referred to as R. ---.

The Reporter's Transcript of the pre-trial proceedings (pre-trial record) will be referred to as PTR. ---.

The Reporter's Transcript of the hearings (hearing record) will be referred to as HR. ---.

The Reporter's and Clerk's Transcripts on appeal to the California Supreme Court will be referred to as Rep. Tr. --- and Cl. Tr. ---.

The original exhibits before the District Court will be referred to as Pet. Ex. --- and Resp. Ex. ---.

Unless otherwise indicated, emphasis has been added by appellant.

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JURISDICTIONAL STATEMENT

The jurisdiction of the District Court to hear and determine the petition for writ of habeas corpus was based upon the allegations of deprivation of constitutional rights by the California courts (28 USC §§ 2241, 2242 and 2243); the exhaustion of appellant's remedies in the State courts (28 USC § 2254); and the mandate of the Supreme Court ordering a hearing in the District Court (R. 53; Chessman v. Teets (1955), 350 U.S. 3).

After the mandate came down, the writ issued (R. 55), and hearings were held (HR. 1-923). On January 31, 1956, the District Court discharged the writ and remanded appellant to custody of the respondent (R. 213).

A certificate of probable cause to appeal was sought

and granted by Chief Judge William Denman of this Court on February 29, 1956 (R. 252-254; Chessman v. Teets, F.2d). On the same date, notice of appeal was filed (R. 255). Thus this Court has jurisdiction to review the judgment and order of the District Court discharging the writ and remanding appellant to custody of the respondent (28 USC § 2253).

This jurisdictional statement is offered in accordance with the requirements of Rule 18, Par. 2(b) of the Rules of this Court. The appeal is taken under the provisions of 28 USC §§ 1291, 1294(1) and 2253, and Rule 73, FRCP.

A motion, with supporting affidavit, for permission to prosecute the appeal in forma pauperis and on a typewritten record has been made to this Court under 28 USC § 1915, and the motion has been granted.

STATEMENT OF THE CASE AND THE FACTS

This appeal is taken from the judgment and order of the District Court (Judge Louis E. Goodman), made and entered on January 31, 1956, discharging a writ of habeas corpus previously granted and remanding the appellant Chessman to the custody of the respondent Warden of the California State Prison at San Quentin (R. 213; Chessman v. Teets, F. Supp.).

As noted, all necessary jurisdictional and procedural requirements for the prosecution of the appeal have been

satisfied (Jurisdictional Statement, supra).

The petition for the writ was originally filed in the District Court as No. 34375-Civil on December 30, 1954, after the Supreme Court had denied certiorari to the Supreme Court of California "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court." (Chessman v. Teets (1954), No. 285, Oct. Term, 1954, 348 U.S. 864.)

By his application, appellant sought to have a hearing on the facts alleged in the petition, upon proper notice, with petitioner and his counsel present and allowed to be heard at such hearing, and to be given the opportunity and right to present evidence in support of the petition.

On January 4, 1955, Judge Louis E. Goodman summarily denied the petition without hearing or requiring respondent to answer (R. 24; In re Chessman, 128 F.Supp. 600).

Two days later, Judge Goodman refused to issue a certificate of probable cause. Appellant then applied to Chief Judge William Denman of this Court for the certificate, and on January 11, 1955 Judge Denman certified there was probable cause to appeal and ordered that appellant's execution, then scheduled for January 14, 1955, be stayed (Application of Chessman, 219 F.2d 162). The notice of appeal, dated January 5, 1955, was filed and the appeal docketed as No. 14621 in this Court.

After the cause was briefed and argued, on April 7,

1955, the order denying the petition for habeas corpus was affirmed by this Court sitting en banc (Chessman v. Teets, 221 F.2d 276). Rehearing was denied on May 6, 1955, and on May 12 the order amending the order denying a rehearing was filed. Appellant's stay of execution was thereby terminated.

On May 13, 1955, appellant was resentenced to death, with the date of execution in the warrant fixed for July 15, 1955.

On June 30, 1955, the case was docketed in the Supreme Court and a petition for writ of certiorari to this Court was filed, No. 196, Oct. Term, 1955. An application for a stay of execution was also filed.

Supreme Court Justice Tom Clark granted appellant's application for a stay of execution pending a decision on the petition for writ of certiorari on July 5, 1955. The stay order was received and filed by the Supreme Court Clerk on July 6, 1955.

On October 17, 1955, the Supreme Court granted certiorari, reversed this Court, and remanded the case to the District Court for a hearing (Chessman v. Teets, 350 U.S. 3). In its Per Curiam opinion, the Supreme Court discussed appellant's claims and held as follows:

> "Petitioner applied to the United States District Court of California, Southern Division, for a writ of habeas corpus, claiming that his automatic appeal to the California Supreme Court from a conviction for a capital offense had been

heard upon a fraudulently prepared transcript of the trial proceedings. The official court reporter had died before completing the transcription of his stenographic notes of the trial, and petitioner alleges that the prosecuting attorney and the substitute reporter selected by him had, by corrupt arrangement, prepared the fraudulent transcript. On the record before us, there is no denial of petitioner's allegations. The District Court, without issuing the writ or an order to show cause, dismissed the application as not stating a cause of action. 128 F.Supp. 600. The Court of Appeals affirmed the order of the District Court. 221 F.2d 276. The charges of fraud as such set forth a denial of due process of law in violation of the Fourteenth Amendment. See Mooney v. Holohan, 294 U.S. 103. Without intimating any opinion regarding the validity of the claim, we hold that in the circumstances disclosed by the record before us the application should not have been summarily dismissed. Accordingly, the petition for a writ of certiorari is granted, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court for a hearing."

And in certifying probable cause, Chief Judge Denman correctly noted that (R. 252-253):

"The court reporter who recorded the trial died after transcribing only a portion of his notes. By a peculiar quirk of California law in a civil case such a death of a reporter gives the trial court the discretionary power to set aside the judgment and order a new trial, California Code of Civil Procedure § 953(e), but there is no comparable provision whatever for criminal cases. Here another reporter finished the transcription of the notes. Thereafter a proceeding to perfect the transcript was conducted by the Superior Court which had tried Chessman. This proceeding was participated in by the reporter who had finished the transcription and who had difficulty in certain places in the notes made under the shorthand system used by the dead reporter. In seeking to overcome this difficulty the testimony of certain witnesses was used, including that of the prosecuting attorney. The latter aided by giving his memory of what transpired at the trial.

"Chessman was at no time present in this proceeding to perfect the transcript nor represented by

counsel, to present his contentions, inter alia, that the transcript should show certain prejudicial statements made by the prosecuting attorney and the instructions to the jury that if they found him guilty they must render a verdict for the death penalty. He was denied the opportunity to cross-examine witnesses, present witnesses and add his own memory to the resources from which the transcript was finally compiled."

Appellant's application to be produced when the transcript was settled was denied without prejudice by the California Supreme Court, and simply ignored by the trial judge, the Hon. Charles W. Fricke, although the trial prosecutor earlier had sworn to the California Supreme Court that appellant would be present and allowed to present his objections.

Appellant, at the time of the settlement of the transcript was appearing in propria persona, without representation by counsel. He has been held in San Quentin Prison's Death Row, awaiting execution, since July 3, 1948. For five years and ten months from that date he continued to represent himself. At no time did the courts of California ever accord appellant an opportunity to defend against the transcript at a hearing to test the transcript's validity and adequacy. (See, e.g., People v. Chessman (1950), 35 Cal.2d 455 [218 P.2d 769, 19 ALR2d 1084].)

Appellant had been tried in the Los Angeles County Superior Court before a jury for the alleged commission of 18 felony charges. (The original trial record is before this Court on appeal as part of Petitioner's Exhibit 1,

records of the California Supreme Court in Crim. 5006, People v. Chessman.)

The trial was a lengthy one, beginning April 29 and ending May 21, 1948. Appellant defended himself. Eighty-one witnesses testified and were called or recalled a total of more than 120 times (see Rep. Tr., Vol. 1, General Index to Witnesses, pp. i-v). It will be noted the testimonial evidence alone comprises 1500 pages of the disputed Reporter's Transcript (Rep. Tr. pp. 55-1558). Eighty-four exhibits were offered (see Rep. Tr., Vol. 1, Index to Exhibits, pp. vi-x). There were two full days of argument to the jury (Rep. Tr. pp. 1559-1786). More than 50 different, complex instructions were given (Cl. Tr. pp. 83-134).

On May 21, 1948, appellant was found guilty of 17 of the charged felonies, acquitted on one (Cl. Tr. pp. 172-222). Motion for new trial was denied and judgment rendered on June 25, 1948, and appellant was then sentenced twice to death[1] and to 15 terms of imprisonment.[2]

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[1]For two violations of section 209 of the California Penal Code, charging Kidnaping for the Purpose of Robbery, with a finding of bodily harm by the jury and a fixing of the punishment at death.

[2]For two violations of section 209 of the California Penal Code, charging Kidnaping for the Purpose of Robbery, with a finding by the jury of bodily harm and a fixing by the jury of the punishment at life imprisonment without possibility of parole as to one count and no finding as to bodily harm on the other count; for two violations of section 288a of the California Penal Code; for one count of Attempted Rape; for one count of Grand Theft of an automo-

(continued)

The lengthy litigation ensued which resulted ultimately in the Supreme Court-ordered hearing in the court below.

On November 10, 1955, George T. Davis and Rosalie S. Asher, new counsel for appellant, filed their notice of appearance on appellant's behalf with the District Court (R. 50).

The mandate came down and was filed in the District Court on November 28, 1955 (R. 53). Two days later, on November 30, 1955, Oliver J. Carter, the Judge then sitting in the Master Calendar Department, assigned the proceeding back to Judge Louis E. Goodman over the objection of counsel for appellant (PTR. 2-6).

Judge Goodman rejected counsel for appellant's suggestion he disqualify himself (PTR. 7-13, 19-20), ordered appellant's execution stayed (R. 54), and issued a writ of habeas corpus returnable on December 8, 1955 (R. 55).

Subsequently, on December 30, 1955, Judge Goodman ordered stricken (R. 120) an affidavit filed December 29, 1955, under 28 USC § 144, which sought to disqualify him from hearing the matter (R. 101).

Appellant was produced in court on December 8, 1955, and hearing of the matter was set for January 9, 1956,

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bile; for 8 counts of First Degree Robbery; and for one count of Attempted Robbery.

(R. 58; PTR. 42-56), then put over one day to January 10, 1956 (R. 85; PTR. 107), and later reset for January 16, 1956 (R. 122; PTR. 206).

On December 8, 1955, Judge Goodman made an order that respondent should permit appellant to consult freely and privately with his counsel at the prison between the hours of 9 a.m. and 6 p.m. on all days pending the hearing (R. 59). This order was amended on December 21, 1955 to permit an investigator and witnesses also to consult freely and privately with appellant (R. 100).

Pending the hearing, appellant repeatedly motioned to be transferred from San Quentin Prison to the San Francisco County Jail, in custody of the United States Marshal, on the ground he was being prevented from preparing his case for hearing and that Judge Goodman's amended order was being flagrantly violated by respondent (R. 6-79, 86-87, 89-98; see R. 109-117, PTR. of November 30 and December 8, 16, 21).

All of these motions for transfer were denied by Judge Goodman (R. 48, 59, 99), even after the California Attorney General's office, counsel for respondent, joined in one of the motions(PTR. 176).

Judge Goodman offered to transfer appellant to Alcatraz (PTR. 187-190). Appellant accepted but asked only that he be transferred with such directions to the warden as would enable him a reasonable opportunity to prepare for the hearing (R. 123, 125, 128). Appellant's counsel, by a

phone call to Warden Madigan, had learned that if appellant were to be transferred without such orders appellant would be confined in what amounted to solitary confinement (R. 134-138). Judge Goodman chided appellant and his counsel for not accepting unconditionally, and refused to make the transfer (R. 126; see R. 128, 130, 132).

Having exhausted his funds and credit, appellant was obliged to file an affidavit seeking to proceed in forma pauperis on January 7, 1956 (R. 139). On January 10, 1956, Judge Goodman granted appellant leave to proceed in forma pauperis (R. 157).

Hearings were held, with appellant present, on January 16, 17, 18, 19, 20, 23 and 24, 1956 (HR. 1-919).

Appellant's motion to make the People of the State of California a respondent in the proceedings (R. 127) was denied (R. 215, item 9(a); PTR. 220-224).

J. Miller Leavy, the deputy district attorney who had prosecuted appellant and whom appellant had charged with fraudulent conduct in the petition, and a key witness, was permitted to appear as one of the counsel for respondent over the objections of appellant's counsel (HR. 3-9).

Appellant's application to be furnished a photostatic copy of the dead reporter's shorthand notes without prepayment of costs (R. 145) was denied (R. 157).

Appellant's application for a declaration of rights under 28 USC §§ 2201 and 2202 (R. 168-169) was summarily

denied (HR. 915-916).

Appellant's attempts to secure court orders to take the depositions of material witnesses or to have them subpoenaed was unsuccessful (R. 157, HR. 913-914; see R. 160, 167).

Judge Goodman would not permit the ability of Stanley Fraser, the substitute reporter, to transcribe the dead reporter's notes to be tested (HR. 248-250).

Judge Goodman would not permit appellant to prove Stanley Fraser had, as alleged in the petition, a long arrest record for drunkenness and that he had been arrested for that same offense during the actual period he was attempting to prepare the reporter's transcript; and that Fraser's chronic addiction to alcoholic beverages led to his attempting suicide, suffering from delirium tremens and hallucinations that the Mafia was after him, and lengthy hospitalization (R. 912; see R. 150, 152-153, item 20, 162-163, item 5; PTR 234).

On January 25, 1956, Judge Goodman ordered the matter submitted, and, as noted above, on January 31, 1956, Judge Goodman vacated the stay of execution, discharged the writ and remanded appellant to custody of the respondent (R. 204-215; Chessman v. Teets, F.Supp.).

Those further facts essential to a determination of the appeal will be presented under the various points of argument below.

SPECIFICATION OF ERRORS

The District Court erred:

1. In not ordering appellant discharged from custody on the ground that he was denied due process of law and equal protection of the law because he was not permitted to be present or represented by counsel at the time the disputed reporter's transcript was settled and because the courts of California gave him no opportunity to defend against that transcript.

2. In denying appellant that type of full and fair hearing ordered by the Supreme Court by:

a. Refusing to permit the taking of depositions of material witnesses or to order their production;

b. Depriving appellant of a just resolution of the issues by its rullings too narrowly and prejudicially restricting, or excluding altogether, competent, material and relevant evidential proof;

c. Refusing to allow appellant adequate time and opportunity to prepare for the hearings;

d. Permitting J. Miller Leavy to appear as one of the counsel for respondent;

e. Denying appellant's motion to make the People of the State of California a respondent in the proceedings;

f. Refusing to have the dead reporter's shorthand notes photostated and furnished appellant without prepayment of costs; and

g. Refusing to disqualify itself and allow another District Court Judge to pass on the affidavit to disqualify under 28 USC § 144.

3. In ruling that, on jurisdictional grounds, it could not and would not declare appellant's rights under 28 USC §§ 2201 and 2202.

SUMMARY OF ARGUMENT

I. A. Appellant was not permitted to establish inadequacies and omissions in the disputed reporter's transcript, was not permitted to be present or represented by counsel at the time of its settlement (or at any time), and was not permitted to produce witnesses or to test the ability of the substitute reporter to transcribe the dead reporter's shorthand notes.

B. The courts of California denied to appellant due process and equal protection of the law in ordering prepared, settling, and accepting for use on appeal such a reporter's transcript of the trial proceedings, used as a basis for affirming the death and other judgments, without giving appellant any opportunity to defend against that transcript.

II. Appellant was denied that type of hearing ordered and contemplated by the Supreme Court of the United States in its mandate (350 U.S. 3) because:

A. The District Court refused to permit the taking of depositions of material witnesses or to order their

production.

B. The District Court deprived appellant of a full and fair resolution of the issues by its rulings too narrowly and prejudicially restricting, or excluding altogether competent, material and relevant evidential proof.

C. The District Court refused to allow appellant adequate time and opportunity to prepare for the hearings before such deprivation amounted to a denial of due process of law.

III. The District Court prejudicially abused its discretion, over appellant's objection, in permitting J. Miller Leavy to appear as one of the counsel for respondent.

IV. The District Court erred, to appellant's prejudice, in denying appellant's motion to make the People of the State of California a respondent in these proceedings.

V. The District Court committed reversible error in ruling that, on jurisdictional grounds, it could not and would not declare appellant's rights under 28 USC §§ 2201 and 2202.

VI. The District Court prejudicially abused its discretion in refusing to have the dead reporter's shorthand notes photostated and furnished appellant without prepayment of costs.

VII. A. The record shows, as a matter of law, a personal and fixed bias on the part of Judge Goodman against appellant and in favor of the State of California.

B. Judge Goodman, on the filing of the affidavit to disqualify, should have permitted another District Court Judge to pass on the disqualification in the manner provided by 28 USC § 144.

ARGUMENT

I A. APPELLANT WAS NOT PERMITTED TO ESTABLISH INADEQUACIES AND OMISSION IN THE DISPUTED REPORTER'S TRANSCRIPT, WAS NOT PERMITTED TO BE PRESENT OR REPRESENTED BY COUNSEL AT THE TIME OF ITS SETTLEMENT (OR AT ANY TIME), AND WAS NOT PERMITTED TO PRODUCE WITNESSES OR TO TEST THE ABILITY OF THE SUBSTITUTE REPORTER TO TRANSCRIBE THE DEAD REPORTER'S NOTES.

The official court reporter died after the trial and before he had completed some 1200 pages of testimony, plus another 300 pages of the voir dire examination of prospective jurors and the prosecutor's opening address.

California law mandatorily requires an automatic appeal to its Supreme Court in capital cases. (Pen. Code, § 1239(b).) This appeal is an "extraordinary precaution" taken by the Legislature "to safeguard the rights of those upon whom the death penalty is imposed by the trial court." (People v. Bob (1946), 29 Cal.2d 321, 328 [175 P.2d 12].)

The Rules of the California Judicial Council declare that the entire record of the trial must be prepared and certified as true and correct by the court reporter who stenographically recorded the trial proceedings. (Rules

on Appeal, Rules 33(c) and 35(b).) "The Rules on Appeal have the force of law and cannot be disregarded or ignored by litigant or court." (Kuhn v. Ferry & Hensler (1948), 87 Cal.App.2d 812, 815.) "[T]he procedural rules of the courts are a part of the due process of law established in this state . . . and must be observed in the interests of orderly functioning of the administration of justice." (People v. Gilbert (1944), 25 Cal.2d 422, 439 [154 P.2d 657].) And the State's organic law commands that the California Supreme Court must review the entire record in a death penalty case before affirming or reversing. (Const. of Calif., Art. VI, § 4 1/2.)

Yet here, with the death of the court reporter, the record was not and could not be prepared in accordance with the laws and rules governing appeals. As a doubtful makeshift procedure, at the direction of the trial judge (who directed preparation of the transcript, not by law and by rule, but by "human ingenuity"), the prosecutor selected another reporter, Stanley Fraser, to undertake to transcribe the dead reporter's old-style, three-position, shaded Pitman shorthand notes.

This reporter, paid over three times the statutory fee for his labors (R. 208-209), was the uncle-in-law of the prosecutor, J. Miller Leavy (HR. 170, 452), a fact kept concealed from the trial judge during the period of preparation (HR. 860-861). After many months and extensions

of time, Fraser finally produced what purported to be a reporter's transcript of the trial proceedings.

Without the knowledge of the trial judge or appellant (HR. 870-871), but with the knowledge and at the suggestion of Leavy (HR. 504, 533), Fraser had consulted with two key prosecution witnesses, Los Angeles Detectives Lee Jones and Colin Forbes, about their testimony (HR. 396-397, 417-420), thus enabling them to give testimony out of court and in the absence of appellant. This fact was not known to the State Supreme Court in any of the proceedings before it. Fraser also had used the trial judge's longhand notes (Resp. Ex. B) never made available to appellant, to aid him in preparing the so-called reporter's transcript, and, uniquely, prepared it first in "rough draft" form and permitted it to be checke by Leavy before being copied in "final form."

Hearings were held in the trial court to settle the transcript, with Leavy actively participating. During the course of these hearings, witnesses were called and testified. Appellant was neither present nor represented by counsel. His motion to be present, challenge the transcript produce witnesses of his own and test the ability of the substitute reporter was denied without prejudice by the California Supreme Court and ignored by the trial court.

When he testified at the hearing in the court below, Leavy lightly dismissed his erroneous sworn statement to the State Supreme Court that appellant would be produced

in the trial court when the record was settled as a mistake (HR. 543). It was a "mistake" he easily could have avoided, had he wanted to, by simply having asked the trial judge if the latter did in fact intend to produce appellant. It was further a "mistake" relied on by the California Supreme Court and one that bordered on, if it did not actually involve, perjury.[3]

Later, still over appellant's vigorous objections, with portions being ordered added to it but with hearings on its validity and accuracy never being held, this record was ultimately accepted by the California Supreme Court[4] (People v. Chessman (1950), 35 Cal.2d 455 [218 P.2d 769,

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[3] See Calif. Pen. Code, § 125: "An unqualified statement of that of which one does not know to be true is equivalent to a statement of that which one knows to be false."

[4] That court admitted the challenged transcript "was prepared in a situation for which the Rules on Appeal do not expressly provide" (p. 458 of 35 Cal.2d); that "Concededly the reporter's transcript is not a verbatim record of every word that was said in the trial court" (p. 461 of 35 Cal.2d); that it was not certified as correct as required but only certified to be correct to the best of the substitute reporter's ability (pp. 458-459 of 35 Cal. 2d). While recognizing that, under State law, appellant was entitled to the entire record (p. 459 of 35 Cal.2d), the court refused to order the record augmented to include what is indicated in the transcript as a "(Discussion as to subpoenaing witnesses)" (Rep. Tr. p. 10), and a "discussion between the trial court, counsel and the defendant (Chessman), and conceded by the deputy district attorney, that an Attorney, William Roy Ives, given the opportunity to prepare the case, would appear with or for the defendant, (p. 465 of 35 Cal.2d), both discussions taking place after the cause was called.

Finally, while recognizing that a determination of

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19 ALR2d 1084]), and later used as a basis for affirming the death and other judgments imposed (People v. Chessman (1951), 38 Cal.2d 166 [238 P.2d 1001]).

B. THE COURTS OF CALIFORNIA DENIED TO APPELLANT DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN ORDERING PREPARED, SETTLING, AND ACCEPTING FOR USE ON APPEAL SUCH A REPORTER'S TRANSCRIPT OF THE TRIAL PROCEEDINGS, USED AS A BASIS FOR AFFIRMING THE DEATH AND OTHER JUDGMENTS, WITHOUT GIVING APPELLANT ANY OPPORTUNITY TO DEFEND AGAINST THAT TRANSCRIPT.

As a result of the facts disclosed just above, appellant never was given an opportunity in the State courts,

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whether one reporter can transcribe another reporter's shorthand notes "is essentially a question of fact to be determined in each case in which it may arise" (p. 461 of 35 Cal.2d), and while placing the burden of proving the prejudicial inadequacy of the transcript upon appellant (p. 462 of 35 Cal.2d), and noticing that appellant "urged that he should have been allowed to appear personally in the proceedings which resulted in the present reporter's transcript, and that he should now be allowed to appear personally before the trial judge in support of his position" (p. 467 of 35 Cal.2d), by denying his motions that he be allowed to appear in the superior court, adduce evidence and call hostile and unwilling witnesses, the court itself foreclosed appellant from proving the record inadequate, and this was candidly admitted to be done as a discriminatory penalty for self-representation (p. 467 of 35 Cal.2d). See dissenting opinions (pp. 468-473).

An earlier attempt to stop the preparation of the transcript by this unique means failed when, in answer to a petition for writ of prohibition filed in the California Supreme Court, the prosecutor filed an affidavit in which he swore that appellant would be produced in the trial court and allowed to present his objections to the record at that time; that is, when the transcript was "settled." (Chessman v. Superior Court (Nov. 1948), Crim. 4950, unreported.) But appellant was not produced, and the prosecutor, although content to let the Supreme Court rely on his representations, did not tell the trial court of them.

at any time, to defend against this disputed transcript or to prove, as he claimed, that it was prejudicially incomplete and inaccurate, and in fact no transcript at all; that it prevented appellant from establishing that he had been convicted in violation of fundamental constitutitional guarantees protected by the 14th Amendment (by the instructions of the trial court; by the use in evidence of a coerced "confession" made orally only; by the flagrant misconduct of the prosecutor; by being deprived of any opportunity to prepare his defense or to be represented by counsel of his own choice, and by not being allowed to subpoena defense witnesses); and that the prosecutor and the substitute reporter, a person allegedly mentally and morally incompetent because of his chronic addiction to and excessive use of alcoholic beverages, had prepared a fraudulent transcript and corruptly secured its acceptance by the State courts.

The guides for decision and controlling law are clear.

Appellant was entitled to an appeal (In re Albori (1928), 95 Cal.App. 42, 48-49):

> " . . . in all the fullness with which we have seen that it is characterized, [because it is a right] guaranteed by the constitution to the appellant. It is he who is to be protected by the appellate tribunal."

In California (In re Hoge (1874), 48 Cal. 3, 6):

> "The right of appeal to the supreme court is guaranteed by the constitution to the prisoner, and is as sacred as the right of trial by jury."

And (Wuest v. Wuest (1942), 53 Cal.App.2d 339, 345):

> "The right of appeal is as sacred and inviolable as the right to a trial, and when by judicial oppression such right is violated or vitiated, the guaranteed and substantial rights of a party have been materially affected thereby."

Whether appellant has been denied due process of law and equal protection of the law must be tested by all of the judicial proceedings in the California courts, including the mesne and appellate proceedings (Cole v. Arkansas (1948), 333 U.S. 196; Frank v. Mangum (1915), 237 U.S. 309).

When the California Supreme Court decided the question of the validity and adequacy of the uniquely prepared transcript against appellant, while denying him any opportunity to present his evidence against its validity and adequacy, although placing the burden of proof squarely upon him, it denied appellant due process in its most primary sense. (Saunders v. Shaw (1917), 244 U.S. 317, 319.)

The equal protection of the laws clause of the Fourteenth Amendment precludes California from keeping appellant imprisoned and from taking his life for the reason it has persisted in depriving him of the type of appeal afforded all others convicted of a capital offense, which is an appeal from a true, complete and certified transcript of the entire proceedings. (Dowd v. United States (1951), 340 U.S. 206, 210.)

The action of the California Supreme Court in depriving

appellant of his right to appeal from an accurate, complete, correctly certified and jurisdictionally prepared transcript of the trial record, without adequate opportunity to defend against that deprivation, was a denial of due process. (Shelley v. Kraemer (1948), 334 U.S. 1, 16.)

The California Supreme Court refused to order the record augmented to include proceedings had at the trial in which inhered federal constitutional questions on the ground those proceedings could not lead to a reversal (p. 466 of 35 Cal.2d). But that court could not properly avoid review by the federal courts of its disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact. (Williams v. North Carolina (1945), 325 U.S. 226, 236; Reece v. Georgia (1955), 100 L.Ed.(Adv.Ops.) 109, 112.)

It is not simply a question of State procedure when a State court of last resort closes the door, as here, to any consideration of a claim of denial of a federal right. (Young v. Ragen (1949), 337 U.S. 235, 238.)

To conform to due process of law, appellant was entitled to have the validity of his convictions appraised on consideration of the case as it was presented to and determined by the trial court. (Cole v. Arkansas, supra, 333 U.S. 196, 202.) By using the disputed reporter's transcript as a basis for hearing the appeal, the California Supreme Court did not and could not appraise appel-

lant's convictions "on consideration of the case as it was tried and as the issues were determined in the trial court," and this being so, appellant "has been denied safeguards guaranteed by due process of law--safeguards essential to liberty in a government dedicated to justice under the law" (id., p. 202).

The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion. (Roller v. Holly (1900), 176 U.S. 398, 409.)

Yet in People v. Chessman, supra, 35 Cal.2d 455 [218 P.2d 769, 19 ALR2d 1084], the California Supreme Court treated all of appellant's rights, including those constitutional rights he asserted, as matters exclusively within the exercise of its discretion to grant or withhold (see p. 460 of 35 Cal.2d).

The failure to guard and enforce constitutional rights is not answered by a substitution of the rationale that where "The record appears to contain ample evidence to support the verdict" (p. 463 of 35 Cal.2d), "it is adequate to permit us to ascertain whether there has been a fair trial and whether there has been a miscarriage of justice" (p. 462 of 35 Cal.2d).

Not only is the guarantee of equal protection of the laws a pledge of the protection of equal laws (Yick Wo. v. Hopkins (1886), 118 U.S. 356, 369; Skinner v. Oklahoma (1942), 316 U.S. 535), but it is a like pledge of the

equal protection of equal laws (Cochran v. Kansas (1942), 316 U.S. 255).

Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which appellant has a right to demand. (Hill v. Texas (1942), 316 U.S. 400, 406.)

Inasmuch as California has provided appellate review in cases such as this, constitutional safeguards attached at all stages of the appellate proceedings and their violation compels the relief here sought.

II. APPELLANT WAS DENIED THAT TYPE OF HEARING ORDERED AND CONTEMPLATED BY THE SUPREME COURT OF THE UNITED STATES IN ITS MANDATE (350 U.S. 3) BECAUSE:

A. THE DISTRICT COURT REFUSED TO PERMIT THE TAKING OF DEPOSITIONS OF MATERIAL WITNESSES OR TO ORDER THEIR PRODUCTION.

Both the District Court and opposing counsel found opportunity to refer to appellant's attempts to secure and introduce evidence as "fishing expeditions" or "explorations" or "discovery proceedings."

Yet it is recognized that depositions may be used either to produce leads as to where evidence may be found or to produce evidence for use at the trial (Engl v. Aetna Life Ins. Co. (2 Cir., 1943), 139 F.2d 469).

On November 30, 1955, the District Court assured counsel for appellant that all process for the production of witnesses would be afforded (PTR. 20); and with or without

specific statutory authority, the Court indicated that it would make an effort to see that evidence it considered material would be produced. For example, on December 8, 1955, the Court suggested that the shorthand notes be secure without the necessity of a subpoena being issued (PTR. 60-6

Yet a perusal of the record shows that the only witness the Court desired to hear was Judge Neely (who, on learning he was to be called, suddenly remembered nothing), and it was he and he only whose production the Court offered to attempt to secure. With reference to all of the other witnesses whom appellant sought to produce to prove the allegations of his petition, the Court exhibited a total disinterest and refused to act, either by arranging for their production or by the taking of their depositions.

The witnesses whose testimony appellant sought to get before the Court and the nature of the testimony will be found at R. 151-153, 160-166, 167; see PTR. 227 et seq., 243-249.

As noted, every attempt by appellant in advance of and during the hearings to secure subpoenas for the production of, or to take the depositions of, his witnesses was denied by the Court (R. 157; HR. 552, 913-914; see PTR. 243-249).

And although, as shown above, the Court expressed a willingness to assist appellant in securing witnesses with or without statutory authority, it first subsequently declined to require the attendance of appellant's witnesses

residing in Los Angeles on the ground it had no power to do so, and then it next refused to use its unquestioned power to permit the taking of depositions of those witnesses.

If the District Court was right in the manner in which it kept appellant from proving his case, then the Supreme Court wittingly or unwittingly ordered a hearing that was meaningless. It necessarily said, "We are giving you a hearing in San Francisco, but of course you won't be able to compel the attendance of witnesses who live in Los Angeles or take their depositions. On the other hand, the State will be free to produce anyone it wants."

B. THE DISTRICT COURT DEPRIVED APPELLANT OF A FULL AND FAIR RESOLUTION OF THE ISSUES BY ITS RULINGS TOO NARROWLY AND PREJUDICIALLY RESTRICTING, OR EXCLUDING ALTOGETHER, MATERIAL, COMPETENT AND RELEVANT EVIDENTIAL PROOF.

The fundamental question of whether Mr. Perry's notes can or cannot be deciphered with any reasonable degree of accuracy, or at all, still has not been resolved. The District Court refused to permit it to be. Nor did the District Court permit the accuracy of the transcript as prepared by Mr. Fraser to be tested.

During the course of the hearings, the following occurred:

> "THE COURT: . So that there won't be any misapprehension about it, I am not going to engage in a test of this proceeding of the accuracy of the record.

"MR. DAVIS: Or the ability of Mr. Fraser to read it?

"THE COURT: No, nor the ability of the man to do it." (HR. 248.)

And then, almost immediately following:

"THE COURT: Of course I don't know what he put down in the transcription [referring to Mr. Fraser].

"MR. DAVIS: That's why I am trying to find out.

"THE COURT: I don't think the Supreme Court of the United States intended me to spend in this court days or weeks of time in determining the accuracy of this transcript. Whether they did or not, I am not going to do it.

"MR. DAVIS: Well, could we have perhaps ten minutes on that?

"THE COURT: That is not an issue in this case. This man [Fraser] could have been the most incompetent reporter in the world and he could have made a mess of the transcript in typing it, and that does not raise any federal question. The State of California and the parties to that litigation could determine that." (Hr. 249.)

And then:

"THE COURT: That is right, I am not going to test his [Fraser's] ability in this proceeding or whether or not his statement that he transcribed this -- made this transcript correctly is correct or not. That would involve a technical adventure in the field of shorthand reporting which this Court is not equipped to do, nor which it should do in connection with a habeas corpus proceeding.

"If there is any failure of due process, as the Supreme Court has said, involved in this, that is another question. But the mere accuracy of it -- it could be -- it could be 75 percent wrong, and it wouldn't raise any federal question." (HR. 250.)

With these rulings and comments, appellant's case

literally went out the window virtually before the hearings got underway. (See also HR. 177.)

Stanley Fraser was obliged to admit that he could not read the shorthand notes from the stand (HR. 281 et seq.).

Paul Burdick, the State's well paid "expert" and admitted "warm friend" of those charged with the fraud (HR. 707-711), was forced to make the same admission and concede the notes were "shattered" (HR. 724-725) after having painted such a glowing word picture of how he had "checked" the transcript as prepared by Fraser against Mr. Perry's notes and found it to be such a marvelous job of transcribing (HR. 698-705).

But it is not the self-serving words of the principals that should control; it is whether or not the Perry notes actually can be deciphered. In his petition for the writ, appellant alleged they could not be. He still makes that claim. If the allegations of fraud are true, it would be naive of anyone to assume that those charged with the fraud would get on the stand and admit it. Yet, if appellant had been permitted to establish by Fraser that he in fact could not read the notes, then the proof of the fraud could hardly be more convincingly demonstrated.

Appellant attempted to establish that the prosecutor knowingly made sworn misrepresentations to the California Supreme Court to the effect that appellant would be produced when the transcript was settled, and the District

Court declared bluntly:

> "It doesn't make any difference whether that transcript was delivered to him [appellant] on the street, in his apartment or in jail if he got the transcript. I don't see anything material about the representation as to where it was delivered to him, at least for the purpose of this proceeding . . ." (HR. 510.)

And just prior to that, the District Court had said emphatically that "If there was a misstatement made as to the place of delivery of the transcript, I personally would determine that that is utterly immaterial."

But it was highly material. On it turned the question of whether appellant was wrongfully and fraudulently foreclosed from establishing the gross inadequacy of the Fraser transcript in the courts of California (see Point I-A and B, supra).

The testimony of appellant at the hearing, which stands uncontradicted in the record, shows that the transcript was incomplete and inaccurate with reference, among others, to the following matters, all of which raise issues of appellant's rights under the Federal Constitution, and all of which should have been determined by the State courts upon an accurate record: Testimony and evidence pertaining to the alleged coercion of appellant's "confession"; the testimony of Colin Forbes (with whom, significantly, Mr. Fraser found it necessary to confer in attempting to prepare the transcript); and testimony and statements in court by defendant and others, including the

judge and prosecutor, relating to the desire and attempt by appellant to secure counsel of his own choice. Yet, though all of these matters were at issue, the District Court limited the evidence -- and its consideration -- to the sole question of the disputed instruction alleged to have been given by Judge Fricke at a time when the jury returned with questions for him.

The District Court said (HR. 513):

> "But it is of sufficient seriousness and bears vitally on what, in my opinion, is the only real question in the case, and that is whether or not there were some instructions that were given and statements made by the presiding judge that are not included in the transcript."

The petition alleged that Fraser was incompetent, had a long record of arrests for being drunk, and was addicted to the excessive use of alcohol (R. 11-12). And when questioned by counsel for appellant, Judge Fricke stated flatly: "I wouldn't have hesitated for a moment in revoking any proceedings that had been had up to that time if I had found out about it afterwards," referring to Fraser's alleged incompetency as a result of his chronic addiction to alcoholic beverages (HR. 890), and: "If I had even heard the rumor, I would certainly have gone and made an investigation to ascertain whether there was any foundation for it or justification for it."

Yet both before and during the hearings appellant repeatedly sought to produce the arrest reports of the FBI

and CII, as well as the files of the Los Angeles Police Department, to prove these allegations, and the District Court refused to require or permit their production and ruled them "inadmissible" (HR. 911, line 24, to 912, line 10; R. 147, item 5; R. 152, item 20; see R. 162, item 4). Appellant was also foreclosed from proving by hospital records that Fraser's excessive and chronic addiction to alcohol led to delirium tremens, hallucinations, attempted suicide and lengthy hospitalization (see R. 153, item 21; R. 162, item 5; R. 147, item 6; R. 150).

Nevertheless, by keeping this evidence out of court, the District Court found (R. 212):

> "5. It is not true that Fraser was incompetent to transcribe Perry's notes because of drunkenness or for any other reason. On the contrary, Fraser was exceptionally and specially competent."

Clearly, appellant lost his case solely because he was prevented from proving his charges.

C. THE DISTRICT COURT REFUSED TO ALLOW APPELLANT ADEQUATE TIME AND OPPORTUNITY TO PREPARE FOR THE HEARINGS BEFORE SUCH DEPRIVATION AMOUNTED TO A DENIAL OF DUE PROCESS OF LAW.

In its opinion and decision, the District Court stated (R. 206):

> "It is appropriate here to record the many collateral proceedings and matters initiated by petitioner from December 8, 1955, to and through the hearings themselves. Not because of any materiality to the resolution of the factual issue which the Court has determined, but to demonstrate the provisions made to afford petitioner a full and adequate hearing of the factual issues. A complete

list of the various applications and motions made by or on behalf of the petitioner, and the Court's rulings thereon, follows as Appendix A."

However, an impartial and independent examination of said applications and motions, with their supporting affidavits, and the District Court's rulings thereon, reveals plainly that appellant was denied adequate time and opportunity to prepare and effectively present his case in court. The treatment of appellant by those holding him at San Quentin, and the conditions that prevailed at the prison are set out fully in those affidavits filed by or on behalf of appellant in the District Court (see R. 60-79, 86-97, 89-98, 109-117; PTR. of November 30, December 8, 16, 21 and 22, 1955).

Importantly, not one counter-affidavit was ever filed. It took repeated and exhaustive effort and almost three weeks from December 8, 1955, to win and induce respondent to grant a reasonable opportunity for appellant, his male counsel and his male witnesses and investigator to confer. Miss Asher was never allowed to see appellant except in the condemned man's visiting "cage," with a guard seated nearby and with a mesh screen separating her and appellant except for a small aperture that was opened.

During this time the undisputed affidavits show that appellant, his counsel and investigator were subjected to constant harassment and provocation. All of appellant's legal papers were thoroughly searched daily, often more

than once. Appellant was even once tried by an institutional disciplinary court for declining to submit "willingly" to a "skin shake" and a search of his papers in deliberate violation of the District Court's explicit order that such searches would not be made when appellant was going to or coming from a conference with counsel. Under such conditions, it was impossible to prepare.

The record of the proceedings prior to the hearings in this matter establishes without contradiction that the appellant was not, as a matter of fact and law, given the time and opportunity to prepare as commanded by due process. The provisions of the Sixth Amendment to the Constitution of the United States apply, but even apart from the guarantee there provided for, the Fifth Amendment also applies with full force and effect to the appellant, guaranteeing to him procedural due process. And an integral part of such due process is effective representation by counsel, which includes an opportunity for preparation (Powell v. Alabama (1932), 287 U.S. 45; Shapiro v. United States (Ct. Cl., 1947), 69 F.Supp. 205, 207). Moreover, the right is so vital that the party deprived of it need not prove with exactitude that he was prejudiced thereby (United States v. Venuto (3 Cir., 1950), 182 F.2d 519, 522; Glasser v. United States (1942), 315 U.S. 60).

The record also shows, both by way of affidavits which are a part thereof and by way of statements of counsel

made in open court, that conversations between appellant and counsel were overheard by agents of the respondent and that legal documents were examined by them. This operated to deprive appellant of the effective aid of counsel and, as a result, of due process of law (Coplon v. United States (App.D.C., 1951), 191 F.2d 749).

As to the District Court's offer to transfer appellant to Alcatraz, the affidavits of Mr. Davis, uncontradicted, show that appellant simply would have gone to solitary confinement and an even worse situation (R. 134-138).

Appellant waited 7 1/2 years for this hearing, and when he finally got it, the State and the Court suddenly got in a headlong rush to get the matter disposed of. Yet the State was never before in a hurry to have the charges tried. In fact, it bitterly resisted a hearing by every means at its command. These were serious, complex charges and new counsel had only taken the case in late October. Witnesses had scattered. They had to be located, if possible. There were literally thousands of pages of record and prior litigation to study. There were many files to be examined carefully. Yet many of these files, although public records, were kept closed to those working for appellant by one ruse or another. Appellant asked the Court to produce the files in advance of the hearing; the Court did not do so. Some were never produced. The remainder appellant never saw until the hearings actually started.

The District Court ordered the production of the shorthand notes and they arrived three days late. Then they were available only when the Clerk's office was open. Appellant's expert, whom he was never able to call, had only a few days to examine them. Yet the State delayed delivery of them while making photostatic copies, and it was able to give its well-paid "expert" unlimited time under the most favorable conditions to examine them.

This sort of hearing is not the kind that meets the standards of due process (Adams v. U.S. ex rel. McCann (1942), 317 U.S. 269, 279).

III. THE DISTRICT COURT PREJUDICIALLY ABUSED ITS DISCRETION, OVER APPELLANT'S OBJECTIONS, IN PERMITTING J. MILLER LEAVY TO APPEAR AS ONE OF THE COUNSEL FOR RESPONDENT.

Los Angeles County deputy district attorney J. Miller Leavy prosecuted appellant at the trial. His "overzealousness" and improper conduct, recognized by the California Supreme Court (39 Cal.2d 166, 177, nn. 2 and 3), helped to convince a jury it should twice doom appellant. After that, at the trial court's suggestion, Leavy found a court reporter to attempt to prepare a transcript of the trial proceedings from the dead reporter's shorthand notes. This reporter was his uncle-in-law, Stanley Fraser, a fact kept from the trial judge and appellant.

Leavy in effect supervised and directed preparation of that transcript in appellant's absence (See Point I-A,

supra). To be sure nothing interfered with the progress of this endeavor, when appellant sought a writ of prohibition against completion of the transcript from the California Supreme Court, Leavy swore to that court that appellant would be produced in court when the record was settled, although appellant never was produced.

On completion of the transcript, Leavy was commended by the trial judge for his worthy efforts. He was also charged by appellant with fraud. After years of litigation, a hearing on appellant's charges finally was ordered by the Supreme Court of the United States.

Although J. Miller Leavy was to be a material witness at this hearing and had a vital personal interest in its outcome (his job, future and reputation were at stake), the District Court permitted him to appear as one of the counsel for respondent over the strenuous objections of appellant (HR. 3-9). The District Court observed at that time (HR. 7):

> "The petitioner could well exclude all the officers of the government, law officers of the government, from acting as counsel in the cause by merely charging them with some conduct in the case."

What appellant could do and what he actually was attempting to do were two entirely different things. This appeal is not concerned with academic generalities or abstractions. The State Attorney General's office had literally dozens of lawyers it could assign, and appellant

certainly could not and would not object, as he did not object to Mr. Bennett and Mr. Smith, who appeared at the hearings on behalf of respondent.

Mr. Leavy actively--and at times theatrically--participated as counsel for the respondent as well as appearing as a witness in the proceedings. This former role prevented him from being excluded when other witnesses with whom he was charged with fraudulent conduct testified; it permitted him to hear the testimony, to dash to the witness stand, demand documents and interject comment.

Not only that, but Leavy questioned trial juror Nana L. Bull when she testified for the State. His appearance apparently was so reassuring that Mrs. Bull testified positively that the jury had found appellant--whom she went to great lengths to make everyone understand she considered an unspeakable person--guilty on all counts (HR. 808), when as a matter of fact shown by the evidence, appellant had been acquitted on one count!

The Canons of Professional Ethics, Canon 19, provide that excepting when essential to the ends of justice, a lawyer should avoid testifying on behalf of his client; and although generally the rule is that the propriety of allowing an attorney, including a prosecuting attorney, to testify, is largely within the trial court's discretion (70 C.J. 183, § 247; id., p. 175, § 233), here, under the peculiar facts of the case, permitting Mr. Leavy to

serve as counsel, with full and prior knowledge that he would be a material witness, was a prejudicial abuse of the District Court's discretion.

As said by the District Court in Nebraska (Frasier v. Twentieth-Century Fox Film Corp. (1954), 119 F.Supp. 495, 496):

> "The submission by counsel of themselves as witnesses upon important questions of fact in their cases is censurable and ought sternly to be discouraged."

IV. THE DISTRICT COURT ERRED, TO APPELLANT'S PREJUDICE, IN DENYING APPELLANT'S MOTION TO MAKE THE PEOPLE OF THE STATE OF CALIFORNIA A RESPONDENT IN THESE PROCEEDINGS.

In its opinion, the District Court lists the persons it states were called by and on behalf of appellant. Among those listed are Los Angeles County deputy district attorney J. Miller Leavy, the prosecutor of appellant, Stanley Fraser the substitute reporter, and Charles W. Fricke, the Los Angeles County Superior Court Judge before whom appellant was tried (R. 205).

In advance of the hearings, on January 7, 1956, appellant filed his "Motion for Permission to Make the People of the State of California a Respondent" (R. 127). The grounds of the motion as stated therein were:

> "1. The People of the State of California are in fact and in law the real party in interest.
>
> "2. It is the People of the State of California's officers, agents and judicial officers who

are charged with fraud, and unless the People are made a respondent, answerable directly to the Court, petitioner, through a technicality, will be foreclosed from calling and questioning these officers, agents and judicial officers as adverse parties, rather than as merely hostile witnesses, and thus petitioner will be kept from impeaching and not being bound by their testimony, as permitted by Rule 43(b) of the Federal Rules of Civil Procedure.

"3. Unless petitioner is released from this technicality and is permitted to call and question these adverse parties in fact as adverse parties he will be greatly handicapped, if not virtually precluded, in and from proving his charges."

The District Court, on hearing the motion, declined to make the People a respondent but withheld final decision (PTR. 220-224). The motion was renewed during the hearings and rejected (R. 215, item 9(a)). The District Court adopte the position that it was free to decide, at its pleasure, how much or how little latitude would be allowed in the examination of the three named witnesses--Leavy, Fraser and Judge Fricke--as well as free to exercise its own discretion, rather than being bound by Rule 43(b), FRCP, in determining the binding effect of their testimony upon appellant (see PTR. 191-193; HR. 173-176).

Squarely presented, as a result, is the question:

Does Rule 43(b), FRCP, apply to habeas corpus proceedings? (And, if not, is a petitioner in habeas corpus left wholly unprotected from the dilemma that confronted appellant?)

If appellant, through the denial of the motion, was and is bound by the testimony of the above three adverse

witnesses as a matter of law, then the District Court seriously erred in denying the timely made motion. If, conversely, appellant was not bound by their testimony, then he was denied the right, as appears from the record herein, to question them as adverse parties and impeach them.

V. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN RULING THAT, ON JURISDICTIONAL GROUNDS, IT COULD NOT AND WOULD NOT DECLARE APPELLANT'S RIGHTS UNDER 28 USC §§ 2201 AND 2202.

Under the provisions of 28 USC §§ 2201 and 2202, appellant filed an application for declaration of rights (R. 168), with supporting affidavits and exhibits (R. 170, 174, 198, 199). The purpose of the application was to secure a favorable ruling on appellant's right to reclaim his valuable literary property--the manuscript of an unpublished novel titled The Kid Was a Killer, authored by appellant--which had been seized by respondent and held against the will and over the protest of appellant, and the release of which would have enabled appellant, at the time compelled to proceed as a poor person, to produce his own expert witness, as well as other witnesses, and to bear the cost of litigation and pay for the photostating of the shorthand notes.

A second purpose of the application was to secure a judicial declaration that the agreement entered into between appellant and George T. Davis, one of his counsel,

was a valid one which respondent must permit appellant to honor. Therein appellant, an established author, agreed to do a biography of the life and career of Mr. Davis in return for the major portion of the latter's fee, but respondent had arbitrarily refused to allow appellant to do this writing, although appellant had no other means of securing the services of Mr. Davis, counsel in whom he had full trust and faith.

The Court summarily denied the application from the bench (1) on the primary ground that it had no "jurisdiction" to declare appellant's rights in a habeas corpus proceeding, and (2) on the second ground that it could not interfere with the "security regulations" at the prison (HR. 915-916).

The District Court was clearly wrong in holding that it was without jurisdiction to declare appellant's rights. The language of 28 USC § 2201 expressly empowers "any court of the United States . . . in a case of actual controversy within its jurisdiction . . . [to] declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought . . ." The section makes no exception of habeas corpus proceedings. Neither does Rule 57, FRCP, nor any case appellant has been able to find. Quite the contrary.[5]

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[5]See Moore, Commentary on the U.S. Judicial Code (continued)

Appellant is aware both of the policy of the federal courts to avoid deciding constitutional questions if possible and the sound reasons underlying that policy. But the policy wisely and swiftly gives way when to avoid deciding such questions would be to evade them and would operate to strip the litigant of hard-won constitutional safeguards. (See Rice v. Sioux City Cemetery (1955), 349 U.S. 70, 75.) Such is the case here, and the public importance of the resolution of the issues tendered by the application for declaratory relief could scarcely be more manifest.

Squarely involved are these freedom of speech, due process and equal protection questions: May a State, through one of its agencies, by administrative fiat, arbitrarily seize and deprive a citizen of his property? Similarly, may a State forcibly deny to any citizen the right to speak freely and to publish his sentiments on any subject, when that citizen remains responsible for

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(Matthew Bender & Co., 1949), p. 59, including footnotes 59-62 ["The declaratory judgment procedure operates like an 'expanded bill quia timet, meant to do in general what that suit did in its limited field.' In other words, by the creation of the new writ the area of adjudication is extended to cover any civil matter raising a justiciable case of controversy over which the federal courts have jurisdiction . . ."] In the federal courts, habeas corpus is a civil writ, Ex parte Tom Tong (1883), 108 U.S. 556; Cross v. Burke (1892), 146 U.S. 82; Fisher ex rel. Barcelon v. Baker (1906), 203 U.S. 174. Here the District Court had appellant in its custody and possessed undoubted jurisdiction over the subject matter both as to the merits and the sought declaration of rights.

the abuse of the constitutional privilege? May a prisoner convicted in a State court of a capital offense be prevented by the State from honoring a contract for the services of competent counsel when the conviction under which he is held in custody for execution is assailed as having been obtained and upheld on appeal in violation of the 14th Amendment and when the Supreme Court of the United States has ordered a federal court hearing of the charges? May the State, in such circumstances, deny to the litigant-prisoner a right effectively to present competent evidence in proof of the charges by employing its naked power to seize, at its whim and pleasure, his valuable literary property and deny him all right to the use and sale of products of his mind? Are there, finally, two kinds of justice: a poor man's and a rich man's justice, a justice that impartially protects all and a "justice" that a State may withhold from anyone it does not like?

It is a curious situation when the respondent here, a State agent, can arbitrarily keep appellant from property that belongs to him and thus prevent him from financing a court fight to prove that other State agents are guilty of fraud.

Long ago the Supreme Court solemnly declared in Roller v. Holly (1900), 176 U.S. 398, 409:

"The right of a citizen to due process of

law must rest upon a basis more substantial than favor or discretion."

And in Louis. & Nash. R.R. v. Stock Yards Co. (1909), 212 U.S. 132, 144, the Court added:

"The law itself must save the parties' rights, and not leave them to the discretion of the courts as such."

Substantial federal questions having been raised, no diversity of citizenship was or is necessary to give the federal courts jurisdiction; and even if the jurisdictional amount must be alleged, that requirement was met in the petition for declaratory relief (R. 186).

There being an actual controversy, a judgment might be granted, even though the rights might be contingent (Pennsylvania Casualty Co. v. Upchurch (5 Cir., 1943), 139 F.2d 892); and declaratory relief also may be granted either alone or in conjunction with another remedy (Petrol Corporation v. Petroleum Heat & Power Co. (2 Cir., 1947), 162 F.2d 327). Nor does the fact that there may be another remedy available operate to prevent declaratory relief being granted, if otherwise it is proper (Motor Terminals v. National Car Co. (Dist.Ct. Del., 1949), 92 F.Supp. 155). Even apart from the pendency of the habeas corpus issues proper, the District Court abused its discretion and prejudicially erred in denying declaratory relief.

Certainly, further, there was an "actual controversy" existing in the habeas corpus proceeding, and there still

is--that is, whether the death and other assailed judgments imposed by the California courts are void or valid under the Federal Constitution.

Lastly, a favorable declaration of rights would not overturn any "security regulations" at the prison. Appellant so alleged in his petition for habeas corpus to the California Supreme Court, summarily denied, and made a part of his application by being filed as a supporting exhibit (R. 184) . Moreover, this is a question of fact on which appellant is entitled to a hearing (see 28 USC § 2202). And present is a basic constitutional question--namely, whether arbitrary "security regulations," in no sense involving security, may take precedence over the federal constitutional guarantee that a litigant may employ and be effectively represented by counsel of his own choosing.

Federal constitutional questions being inherent in the complaint and relief having been denied by the State Supreme Court without a hearing, appellant was entitled to a hearing in the District Court on the constitutionality of the administrative rules promulgated and enforced by officers and agents of the State. The questions which the District Court should have heard and decided are whether these acts of the State operate 1) to deprive appellant of his property without due process of law, and 2) deprive him of the effective aid and assistance of counsel of his

choice.

VI. THE DISTRICT COURT PREJUDICIALLY ABUSED ITS DISCRETION IN REFUSING TO HAVE THE DEAD REPORTER'S SHORTHAND NOTES PHOTOSTATED AND FURNISHED APPELLANT WITHOUT PREPAYMENT OF COSTS.

By written motion, appellant, proceeding of necessity in forma pauperis, asked the District Court to order that the dead reporter's shorthand notes be photostated and furnished appellant without prepayment of costs (R. 145). When the hearings began, appellant renewed the motion, it not having been yet finally acted upon, making it under 28 USC § 2250 (HR. 15-17). The District Court said that section did not permit it to make such an order (HR. 17-18). The appellant believes it does, as the section states expressly:

> "If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of <u>such documents or parts of the record on file in his office</u> as may be required by order of the judge before whom the application is pending."

And surely it may and must fairly be said that these notes, in the possession of the clerk and the most crucial part of the record, were "parts of the record on file in [the clerk's] office" within the meaning of the section.

The District Court indicated there was another provision of which appellant might avail himself (HR. 19),

but appellant does not know what it is, and the District Court never said. So appellant was not able to secure photostatic copies of the notes for study by shorthand reporters because of his untimely poverty. Here again was and is "poor man's justice" at work.

Appellant asks the Court to rule on the applicability of 28 USC § 2250. For as the matter now stands, if a new hearing is ordered and appellant remains without funds, he will be unable to secure and use a photostatic copy of the notes solely because of his poverty.

VII. A. THE RECORD SHOWS, AS A MATTER OF LAW, A PERSONAL AND FIXED BIAS ON THE PART OF JUDGE GOODMAN AGAINST APPELLANT AND IN FAVOR OF THE STATE OF CALIFORNIA.

On December 29, 1955, appellant filed an affidavit under 28 USC § 144 to disqualify Judge Goodman from hearing and deciding the cause on the ground Judge Goodman entertained a personal and fixed bias against appellant and in favor of the State of California and its agents (R. 101-118). As required, counsel's certificate was filed with the affidavit (R. 119).

Appellant particularly asks the Court to read that affidavit. The facts set out therein have never been disputed or denied, for in his disposition of the motion Judge Goodman did not deny the allegations but merely based his ruling on the grounds of a technical insufficiency of the

affidavit. Those facts and the subsequent rulings, actions and attitude of Judge Goodman as shown by the record, this brief and the application for certificate of probable cause (R. 238-244) bring this case within the orbit of the rationale of In re Murchinson (1955), 349 U.S. 133. There the Supreme Court said (p. 136):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14."

Here the hearing judge was personally embroiled and exercised (cf. Offutt v. United States (1954), 348 U.S. 11); here, complaining because the case was in the federal courts and referring to his court as a laundry, he had an announced and determined intention to repudiate appellant and vindicate his position. Here he declared he didn't care what the Supreme Court intended; he was going to proceed in his own way. Here the intemperate language

of his earlier opinion (128 F.Supp. 600), asking rhetorically "What must the citizen think of our 'nickel in the slot' administration of criminal justice?" gave judicial sanction to public hysteria and prejudice (see R. 101-105).

By his actions and language, Judge Goodman had committed himself to a position from which he would not or could not retreat. His personal interest in the outcome of the case from that point was necessarily and patently "substantial" (see 28 USC § 455). In June, 1955, his motion to change the habeas corpus law and shut appellant out of the federal courts altogether was made to the conference of the judges of this circuit. On July 1, 1955, the San Francisco Chronicle front-paged and featured a story by Tom Benet which read in part as follows:

> "A move to outlaw the bulk of Federal Court writs filed by convicted state felons such as Caryl Chessman, San Quentin's condemned author-convict, was unanimously endorsed by Federal Judges of the Ninth Circuit yesterday."

The story quoted Chief Judge Denman to the following effect:

> "'You might be interested in the sort of letters I got because I found there was probable cause for the appeal [from Judge Goodman's angrily worded decision denying habeas corpus, referred to above and later reversed by the Supreme Court],' the white-haired justice told the conference. 'One began: Dishonorable Denman. You ------. All that a rapist has to do is come into your court and you give him everything he asks.'"

And the story significantly stated further:

"The recommendation for the change in the law was presented to the conference by Judge Louis E. Goodman."

Here, when the question of the propriety of him hearing the case was raised by appellant's counsel, Judge Goodman took up the matter of appellant's proposed transfer to the San Francisco County Jail pending the hearing and said without qualification that appellant was entitled to the order and that he would make it. Thereafter, he refused to do so, even when counsel for respondent joined in making the motion.

Here Judge Goodman denied to appellant adequate time and opportunity to prepare; he insisted on a hasty disposition of the matter "irrespective of anything else." He refused to allow the crucial and primary question whether the dead reporter's shorthand notes are or are not decipherable to be resolved. He prejudicially limited the issues. He would not order the subpoenaing of material witnesses or permit their depositions to be taken. He allowed the trial prosecutor, a party charged with fraud and a key witness in the proceedings with a personal interest in their outcome, to appear and actively participate as one of the counsel for respondent. He refused to declare appellant's rights, acting summarily from the bench.

Under such circumstances, Judge Goodman's decision in the case was a foregone conclusion from the outset.

B. JUDGE GOODMAN, ON THE FILING OF THE AFFIDAVIT TO DISQUALIFY, SHOULD HAVE PERMITTED ANOTHER DISTRICT COURT JUDGE TO PASS ON THE DISQUALIFICATION IN THE MANNER PROVIDED BY 28 USC § 144.

Judge Goodman declined to disqualify himself and ordered appellant's affidavit stricken on technical grounds (R. 120, 122).

The affidavit had been filed more than 10 days before the scheduled hearing and thus was timely (28 USC § 144). It would hardly have been possible to have filed it earlier and still set out all of the pertinent and objective facts on which it was based. The disqualification, further, would not have interfered with the regular hearing and disposition of the case.

Fairly read in the light of In re Murchinson (1955), 349 U.S. 133, and Berger v. United States (1921), 255 U.S. 22, and cases there cited, the affidavit does reveal both a personal bias and a personal interest on Judge Goodman's part as claimed and this should have resulted in his letting another District Court Judge pass on the matter of his disqualification in the manner provided by statute in such cases.

CONCLUSION

Appellant is entitled to be discharged from custody on the ground he was denied due process of law and the equal protection of the law because he was not permitted to be present or represented by counsel at the time the disputed reporter's transcript was settled and because the courts of California gave him no opportunity to defend against that transcript. (Point I, supra.)

If his discharge on this ground should not be ordered, appellant is entitled to further hearings in the District Court on his fact claims the disputed transcript was fraudulently prepared and is so garbled and incomplete that appellant was foreclosed from establishing on his mandatory appeal to the California Supreme Court his convictions had been obtained and were affirmed in violation of the Fourteenth Amendment to the United States Constitution.

Such a further and searching judicial inquiry is indicated in the alternative because appellant was denied that type of full and fair habeas corpus hearing contemplated and ordered by the Supreme Court of the United States in its mandate. (Points II, III, IV, VI and VII, supra.)

The hearing, in fact, was one in name only.

The District Court, wrongly, on jurisdictional grounds, denied appellant's application for a declaration of rights under 28 USC §§ 2201 and 2202. (Point V, supra.)

WHEREFORE, appellant prays this Honorable Court to

reverse the order of the District Court--discharging the writ and remanding appellant to custody--with appropriate directions.

Dated: May 7, 1956.

Respectfully submitted,

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